Nos. 71-14-01 and 71-14-51

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

IN THE MATTER OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Debtor*

RICHARD JOYCE SMITH, Trustee of the Property of the New York, New Haven and Hartford Railroad Company, *Debtor*, *Petitioner in No. 71-14-01*

and

LAWRENCE W. IANNOTTI, Successor Trustee Under the First and Refunding 4% Mortgage Bonds, Dated as of July 1, 1947, of the New York, New Haven and Hartford Railroad Company, *Debtor*, *Petitioner in No. 71-14-51*

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, Trustees of the Property of Penn Central Transportation Company, Debtor; MANUFACTURERS HANOVER TRUST COMPANY, as Mortgage Trustee; and PENN CENTRAL TRANSPORTATION COMPANY, *Respondents*

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, IN OPPOSITION

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OPINIONS BELOW

The memorandum of decision of the District Court for the District of Connecticut dated June 11, 1971 is reported at 330 F. Supp. 131, and its order of June 22, 1971 is reported at 331 F. Supp. 212. They are reprinted in the Appendix to the petition in No. 71-14-01

at pages A25-A60 and A61-A65 respectively. The opinion in the United States Court of Appeals for the Second Circuit dated March 17, 1972 is not yet reported. It is reprinted in the Appendix to the petition in No. 71-14-01 at pages A5-A24.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was filed on March 17, 1972. The petition for a writ of certiorari in No. 71-14-01 was filed on April 28, 1972, and the petition in No. 71-14-51 on May 5, 1972. The jurisdiction of this Court is sought to be invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

QUESTION PRESENTED

In December 1968 the District Court for the District of Connecticut—the New Haven Reorganization Court—ordered the New Haven properties transferred to Penn Central free and clear of all liens and encumbrances. In June 1970 the properties came into the possession of, and are now being operated by, the District Court for the Eastern District of Pennsylvania—the Penn Central Reorganization Court. Did the court below properly conclude that the New Haven Reorganization Court had no jurisdiction, in June 1971, to impose an equitable lien and constructive trust on the former New Haven properties?

STATUTES INVOLVED

The relevant sections of the Bankruptcy Act (11 U.S. §§ 1 *et seq.*) are set out in the Appendix to the petition in No. 71-14-01.

STATEMENT

This case is the latest in the continuing controversies arising out of the bankruptcy of the New Haven. The earlier history is described in the opinion of this Court in *New Haven Inclusion Cases,* 399 U.S. 392. The facts now relevant can be briefly summarized as follows:

In 1962 the Pennsylvania Railroad (Penn) and the New York Central (Central) sought authority from the Interstate Commerce Commission (Commission) to merge. The Trustees[1] of the New York, New Haven and Hartford Railroad Co. (New Haven), then and now in proceedings for reorganization before the United States District Court for the District of Connecticut (New Haven Court) intervened in the merger proceeding and petitioned for inclusion of the New Haven in the proposed Penn Central. Penn and Central resisted the inclusion, but in order to obtain Commission approval of the merger, Penn and Central executed a purchase agreement with the New Haven Trustees. That agreement, as later amended, provided for the acquisition by the proposed Penn Central of the New Haven's rail operations and properties. The agreed price for these assets was 950,000 shares of Penn Central common stock, $23 million in Divisional First Mortgage Bonds secured by the New Haven properties, $8 million in cash and the assumption of certain specified New Haven liabilities.[2] In its Second

[1] The sole remaining New Haven Trustee is a petitioner herein.

[2] A New Haven Trustee later testified: "One of the principles for which we negotiated at considerable length was that the bulk of the consideration should be in the form of common stock . . . which would permit the claimants to the New Haven's Estate to participate in the benefits of the [Penn Central] merger." See New Haven Inclusion Cases, 399 U.S. at pp. 483-484.

Supplemental Report, 331 I.C.C. 643 (1967), the Commission approved the Purchase Agreement as the basis for inclusion. The Commission recognized that the New Haven properties had "neither earning power nor the prospect of earning power" (331 I.C.C. at p. 687), but held that as a condition to their merger Penn and Central could and should be required to pay a price determined as though the New Haven were being liquidated. It found that that price was $125 million, and that the consideration to be given by Penn Central was worth that amount.

Review of this action of the Commission was sought by creditors of the New Haven in both the New Haven Court and a statutory three-judge district court. These courts found that the Commission had understated the New Haven's liquidation value and overstated the value of the consideration to be paid by Penn Central. *In re New York, N. H. & H. R.R.*, 289 F. Supp. 451 (D. Conn. 1968); *New York, N. H. & H. R.R. First Mortgage 4% Bondholders' Committee* v. *United States*, 289 F. Supp. 418 (S.D.N.Y. 1968). In its opinion the New Haven Court also threatened, because of substantial continuing losses by the New Haven, to shut down all operations on the New Haven on January 1, 1969, if they had not by that date been taken over by Penn Central.

On remand from the two courts the Commission, in its Fourth Supplemental Report, 334 I.C.C. 25 (1968), increased the consideration to be paid by Penn Central to $145.6 million. It also ordered Penn Central to take over the New Haven's assets by the end of 1968 and concurrently to pay this increased purchase price, whether or not final judicial review of the financial terms had occurred.

Thereafter, on December 24, 1968, the New Haven Court entered an order approving the transfer of the New Haven's assets to Penn Central. That transfer was, with certain specified exceptions not here relevant, to be

> "a binding transfer to the Penn Central Company free and clear of all liens, charges and encumbrances . . . ."

This was in conformity with Section XII of the New Haven's Plan of Reorganization, as adopted by the Commission (334 I.C.C. at 119):

> "The property dealt with by the plan, when transferred and conveyed to Penn Central . . . , shall be free and clear of all claims of the debtor, its creditors and stockholders and all other persons, unless otherwise specifically provided in the . . . present report . . . ."

Inclusion occurred at midnight, December 31, 1968. The consideration prescribed by the Commission was concurrently paid in full by Penn Central. Neither the New Haven Trustees nor any New Haven creditor sought review of the transfer orders.

With inclusion and payment effected, New Haven creditors sought to require an additional payment by Penn Central, seeking review of the Commission's orders in both the New Haven Court and the statutory district court in New York. The New Haven court increased by $29,035,899 the consideration Penn Central was to pay for assuming the New Haven's deficit operations, and in addition devised a so-called "underwriting plan" to cushion the New Haven estate against a decline in the value of Penn Central common stock below $87.50 per share. *In re New York, N.H. &*

H. R.R., 304 F. Supp. 1136 (1969). The statutory district court, on the other hand, affirmed, with minor modifications, the price fixed by the Commission, and accepted the underwriting plan.[3] *New York, N.H. & H. R.R. First Mortgage 4% Bondholders Committee* v. *United States*, 305 F. Supp. 1049 (S.D.N.Y. 1969).

Both decisions were before this Court, and had been argued and were under consideration, when on June 21, 1970 Penn Central filed its petition under Section 77 of the Bankruptcy Act (11 U.S.C. § 205) in the United States District Court for the Eastern District of Pennsylvania (Philadelphia Court). The Philadelphia Court, by its Order No. 1, approved the petition on the same day as properly filed. It thus obtained, under Section 77(a), "exclusive jurisdiction of the debtor and its property wherever located." Its Order No. 1 also included the following provision:

> "9. All persons and all firms and corporations, whatsoever and wheresoever situated, located or domiciled, hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties or premises belonging to, or in the possession of the Debtor as owner, lessee or otherwise, or from taking possession of or from entering upon, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of said railroads, properties or premises or the carrying on of its business by the Debtor under the order

[3] The underwriting plan, which imposed a personal, unsecured contingent obligation on Penn Central, was accepted by the Commission in its Fifth Supplemental Report, 334 I.C.C. 528 (1969).

> of this Court and from commencing or continuing any proceeding against the Debtor, whether for obtaining or for the enforcement of any judgment or decree or for any other purpose, ..."

Eight days later, on June 29, 1970, this Court handed down its decision, 399 U.S. 392. The Court affirmed the decision of the New Haven Court that the consideration should be increased by $29,035,899. It also, in view of "the impact of recent events,"[4] set aside the order of the New Haven Court insofar as it had been determined that the Penn Central stock which the New Haven had received from Penn Central had an intrinsic value of $87.50 per share, and had formulated the underwriting plan. It remanded the cause for further consideration by "the Commission and the appropriate federal courts" of issues involving "the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a shareholder or creditor of Penn Central." 399 U.S. at p. 489.

The only reference in the Court's opinion to the Penn Central bankruptcy appears in an unnumbered first footnote, which notes the filing of the petition under Section 77 eight days before, and states (399 U.S. at 399):

> "Whether the financial obligations dealt with in the present opinion may become subject to modification in or because of those proceedings is a

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[4] The underwriting plan was based on an "intrinsic value" of 87½ for Penn Central stock. On January 2, 1969, immediately following inclusion, the price on the New York Stock Exchange closed at 64. On March 30, 1970, the date of oral argument in this Court, the price closed at 23⅞. On April 30 it was 18; on May 30 it was 12⅝.

question with which the present opinion in no way deals."

On August 10, 1970, the New Haven Court, instead of remanding the cause to the Commission, entered an order directing all parties to file statements of position on certain specified issues as to which, the court indicated, it might give directions to the Commission in its remand order. Among those issues were:

1. Whether the New Haven Court had jurisdiction to impose an equitable lien on the former New Haven assets, and, if so, whether the court should impose it.

2. Whether the court could, and should, order payment to the New Haven Trustee of proceeds of future sales of former New Haven properties covered by the Divisional First Mortgage.

3. Whether the court could, and should, order the Penn Central Trustees to pay to the New Haven Trustee one-half of the "excess income" from the so-called Grand Central Terminal properties.[5]

The Penn Central Trustees, while not parties to the New Haven reorganization proceedings (Penn Central

[5] In the New Haven inclusion proceedings it was determined that the New Haven was entitled to a share of the "excess income" from the Grand Central Terminal properties (the office building and hotel income less Grand Central Terminal expenses). That entitlement was conveyed to the Penn Central as part of the New Haven inclusion on December 31, 1968. The New Haven's interest was found by the Commission to have a capitalized value of $28,438,000; its decision was affirmed by the New Haven Court and by this Court. As a result, $28,438,000 was included in the price paid by Penn Central for the New Haven estate on December 31, 1968.

itself was), appeared before the New Haven court and urged that the New Haven Court was without jurisdiction to enter the orders it proposed, and in any event should not do so.[6] However, on June 11, 1971, the New Haven Court filed its Memorandum of Opinion and announced it would settle its order on June 22, 1971. On that day, pursuant to an order of the Philadelphia Court issued the previous day, as more fully explained below, the Penn Central Trustees again appeared and challenged the jurisdiction of the court and the merits of its proposed order. Nonetheless, the New Haven Court entered its "Order of Remand," in which—

> 1. It purported to determine the amount of New Haven's claim against the Penn Central estate by determining the number and amount of proper offsets against the total purchase price which had been determined by this Court in the *New Haven Inclusion Cases.*
>
> 2. It purported to determine that interest was due on the "unpaid balance" from December 31, 1968, and the rate to be applied. The "unpaid balance" recognized no credit whatever for the bonds and stock paid to the New Haven Trustee on December 31, 1968.
>
> 3. It purported to set aside the purchase and sale of the New Haven assets by stating that the bonds and stock paid to the New Haven Trustee

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[6] In their first appearance in the New Haven court, the Penn Central Trustees' counsel moved that the Trustees' participation "shall be without prejudice to their right to take such action as they may deem appropriate in the [Philadelphia court] or any other court in respect of the exercise of jurisdiction by this court over such Trustees or the debtor [Penn Central] or the property of the debtor." The motion was never ruled on.

on December 31, 1968 should be deemed only "security" for the purchase price.

4. It purported to declare that "all the tangible property" conveyed by the New Haven to Penn Central on December 31, 1968 (except rolling stock and property already sold by Penn Central) is "subject to an equitable lien as of December 31, 1968," to secure the total purchase price.

5. It purported to declare that "all the right, title and interest" of the New Haven in the Grand Central Terminal properties "shall be held in trust" by Penn Central or its Trustees for the benefit of the New Haven until the New Haven shall have received $28,438,000.

6. It purported to order that beginning on July 1, 1971, one-half of the excess income from the Grand Central Terminal properties shall "accrue to the account of the Trustee for the New Haven estate."

7. And it remanded the proceedings to the Commission for further proceedings in accordance with its opinion and order and the opinion of this Court.

On the same day, the New Haven Court appointed special counsel to take steps to "preserve" the equitable lien and constructive trust. On August 23, 1971 the court approved a petition for compensation to that counsel for such services, including the recording of the lien and trust in various jurisdictions.

Meanwhile, there were related proceedings in the Philadelphia Court. As already noted, on June 21, 1971, that court (1) ordered the Penn Central Trustees

to appear on the following day in the New Haven Court and object to the entry of any order beyond the jurisdiction of the New Haven Court or which would interfere with the reorganization of Penn Central; (2) enjoined any action to enforce or collect any claim against Penn Central arising out of the New Haven inclusion other than in the Philadelphia Court, or any action that would interfere with the jurisdiction of that court to deal with properties in its possession; (3) directed the Penn Central Trustees to continue to devote all income from the Grand Central Terminal properties to defray current Penn Central expenses; and directed the Penn Central Trustees not to pay any money, from any source, to the New Haven Trustee.

In the same order, the Philadelphia Court noticed a hearing "at which . . . this court will consider whether it should adjudicate, and may adjudicate, the rights of the Trustees in the properties conveyed" by the New Haven, "and will determine whether or not to continue the foregoing relief, and to consider such other and further relief as may be required to preserve and effectuate the jurisdiction of this Court." Following that hearing, in which counsel for the New Haven Trustee participated, on December 31, 1971 the court filed an extensive opinion. *In the Matter of Penn Central Transportation Company, Debtor,* 337 F. Supp. 779.[7]

After a review of the opinion of this Court in the *New Haven Inclusion Cases,* the Philadelphia Court concluded that this Court had not suggested that the Philadelphia Court refrain from carrying out its functions under Section 77, which included the responsi-

[7] For the convenience of the Court, the opinion and order of the Philadelphia Court are reproduced in the Appendix to this brief.

bility of determining the amount of an unsatisfied debt, deciding whether it is secured or unsecured, and classifying the various claimants for purposes of a reorganization plan. Moreover, it concluded that since the New Haven assets had been conveyed to Penn Central free and clear of liens, and were in the ownership and possession of Penn Central on the date of bankruptcy, the filing of Penn Central's Section 77 petition "vested exclusive jurisdiction over those assets in this [Philadelphia] court, and made it jurisdictionally impossible for any other court to impose liens upon them, except with the approval of this court."

Noting that the New Haven Trustee had filed in May 1971 in the Penn Central proceedings a proof of claim for the same amount which it asserted to be due in the proceedings before the New Haven Court, and that the deadline for filing objections had not yet been fixed and many parties potentially affected by the New Haven claim had no notice or opportunity to object, the court stated its belief that it would invade the "absolute constitutional right" of the other creditors were the court now to adjudicate the New Haven claims. Its order, in consequence, provides that the restraints which it had imposed by its order of June 21, 1971, *supra,* be continued; that the ultimate disposition of the New Haven claim be deferred to the regular program for handling claims; but in order to avoid any prejudice to the New Haven pending final decision—

> "That, without prejudice to the ultimate resolution of the merits of the claims asserted, the Trustee of the New York, New Haven & Hartford Railroad shall, unless and until otherwise ordered by this Court or an appellate court of competent jurisdiction, be deemed to have a lien, indeterminate in amount, and indeterminate as to priority,

upon all of the real property and readily identifiable tangible personal property (exclusive of rolling stock) conveyed to Penn Central by the said New Haven Trustee as of December 31, 1968, and remaining in possession of the Trustees of the Debtor as of June 11, 1971."

The order of the Philadelphia Court has been appealed by various New Haven interests to the Court of Appeals for the Third Circuit.[8]

The court below, on March 17, 1972, reversed the order of the New Haven Court on the ground that it lacked jurisdiction, and remanded the cause to the Commission for further proceedings. Each of the bases of jurisdiction urged to support the order of the New Haven Court was discussed and rejected. Judge Mansfield concurred in the conclusions that the New Haven Court lacked jurisdiction and that the cause should be remanded to the Commission, but dissented from what he assumed to be the position of the majority that ultimate review of the Commission's action would be the sole responsibility of the Philadelphia Court.

ARGUMENT

This case raises no question that deserves review by this Court at this time. It presents the single issue whether the New Haven Reorganization Court had

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[8] In the matter of Penn Central Transportation Company, Debtor, Nos. 72-1172 through 72-1180. An earlier appeal by the New Haven interests from the order of the Philadelphia Court of June 21, 1971, was dismissed without prejudice and the parties remanded to the Philadelphia Court. In the Matter of Penn Central Transportation Company, Debtor, 454 F.2d 210 (3rd Cir. Jan. 3, 1972).

jurisdiction to encumber property which it disposed of several years before and which is now in the possession of and being administered by the Penn Central Reorganization Court. This issue turns on particular facts which are unique, as petitioner in No. 71-14-51 admits (Petition, p. 12). The case therefore raises no question of general importance in the administration of the bankruptcy laws; petitioners refer to a number of railroads now in bankruptcy but they do not and cannot suggest that the issue they seek to present here has arisen, or is likely to arise, in any of those proceedings.

Furthermore, petitioners seek review at a point in time when the problem of the status of the New Haven's claim in the Penn Central bankruptcy remains in an inchoate state. Neither the Commission nor any court has determined as of what date or on what basis the assets delivered by Penn Central to the New Haven are to be valued. Accordingly, the amount of any unpaid claim that the New Haven may have against Penn Central is still indefinite. Neither the Commission nor any court has determined the form of the consideration that the New Haven is entitled to receive for any unpaid portion of its claim against the Penn Central estate. The Commission has not yet had an opportunity to carry forward its sensible suggestion to consolidate the Penn Central and the New Haven proceedings so that it may determine in a single and comprehensive setting what will be fair and equitable to the creditors of both estates. The Penn Central Reorganization Court has in large measure now given the New Haven Trustee the protection he sought from the New Haven Court by providing that the New Haven has a lien, indeterminate in amount and indeterminate as to

priority, pending a final resolution of the problems arising in the two bankruptcies. In these circumstances petitioners' assertion that there is a threat of immediate injury to constitutional rights is without foundation. This Court's review of petitioners' constitutional and other arguments should be deferred until they can be considered in a more specific and immediate context.

In any event, the issue raised by the petitions was correctly decided below.

I

We are aware of no instance in which a Section 77 court, or indeed any bankruptcy court, has sought to assert a jurisdiction comparable to that claimed by the New Haven Court in this instance. That court, in December 1968, approved the sale to Penn Central of the property here sought to be encumbered, expressly providing that the sale was to be "a binding transfer . . . free and clear of all liens, charges and encumbrances." No one appealed from that order. On June 21, 1970, when the Philadelphia Court approved Penn Central's petition for reorganization under Section 77, the property became a part of the property now owned by, operated by and in the possession of the Penn Central Trustees. The court below unanimously and correctly concluded that by the specific terms of Section 77(a) the Philadelphia Court obtained "exclusive jurisdiction of the debtor and its property wherever located," and that in those circumstances the New Haven Court was without jurisdiction to encumber assets over which the Philadelphia Court had exclusive jurisdiction.

II

The decision is in accord with the only previous decision by this Court dealing with a conflict between the respective jurisdictions of two Section 77 reorganization courts. In *Warren* v. *Palmer,* 310 U.S. 132, the New Haven, which was then in an earlier Section 77 reorganization in the District of Connecticut, had leased railroad lines from the Boston & Providence Railroad. The leases were rejected by the New Haven Trustee pursuant to Section 77(c)(6), but operations were continued by the New Haven for the account of the lessor. The Boston & Providence later filed its petition for reorganization under Section 77 in the District of Massachusetts. When the Connecticut Section 77 court declared that the losses of the Boston & Providence were a first lien on its property, the Boston & Providence appealed, arguing that, as lessor, it owned the property and hence the Massachusetts court had exclusive jurisdiction to declare any lien thereon. In deciding that the Connecticut court had exclusive jurisdiction, this Court emphasized the public importance of rail service and the fact that the physical possession of the Boston & Providence property was in that court. It construed Section 77 as intended (310 U.S. at p. 140) to—

> "give *the court charged with operation* the fullest ability to secure the necessities of operation—an intention to give *the operating court* power to promise those having the materials, men and equipment needed for the operation a first lien on the road to secure payment for the operation." (Italics supplied.)

There, when possession and operation were in the Connecticut court, the fact that legal title was in the

Massachusetts court was not enough to support its jurisdiction. Here, possession, operation and title all are in the Philadelphia Court. The New Haven Court, once also charged with operating a railroad, no longer has that position; it now sits merely as a court of liquidation, administering the consideration received for the New Haven assets. In contrast the Philadelphia Court bears the responsibility for maintaining the operations of and supervising the efforts to reorganize one of the largest and most important rail systems in the United States, a responsibility that requires the court to deal with a multiplicity of problems whose complexity and difficulty need no elaboration. For all these reasons, this case is *Warren* v. *Palmer a fortiori*. *See also Gardner* v. *New Jersey*, 329 U.S. 565; *Callaway* v. *Benton*, 336 U.S. 132; *Thompson* v. *Terminal Shares, Inc.*, 104 F.2d 1 (8th Cir. 1939); *Collier on Bankruptcy*, Vol. 2, pars. 23.03, 23.04.

As the court below observed (Pet. in No. 71-14-01, App. p. A16), recognition of the New Haven Court's assertion of jurisdiction

> "could, at this stage of the Penn Central reorganization proceedings, seriously impair the formulation of a workable plan for the financial resuscitation of Penn Central by the Commission and the ability of the Pennsylvania reorganization court to administer the entire Penn Central system . . . ."

III

The argument by petitioners that the jurisdiction claimed by the New Haven Court was in some way conferred by the mandate of this Court in the *New Haven Inclusion Cases, supra,* is without substance. The remand, "to the Commission and the appropriate

federal courts," was "to determine the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a shareholder or creditor of Penn Central." 399 U.S. at p. 489. This conferred no power to the New Haven Court to create or declare retroactive security interests in property no longer in its possession. As noted above, the first footnote in this Court's opinion in the *New Haven Inclusion Cases* expressly states that its opinion "in no way deals" with the effect of the Penn Central bankruptcy on the litigation. 399 U.S. at 399, note. Indeed, in the light of Section 77(a) and the decision in *Warren* v. *Palmer,* only the most explicit language could warrant a conclusion that this Court intended to compromise the powers, duties and responsibilities of the Philadelphia Court. The remand "to the Commission" ordered by the court below fully carries out this Court's remand "to the Commission and the appropriate federal courts."[9]

IV

The other contentions urged in support of jurisdiction in the New Haven Court are equally without substance. That the Penn Central Trustees had appeared before the New Haven Court to protest its action could not, as the court below held, cure the lack of subject-matter jurisdiction; petitioners do not now argue to the contrary.

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[9] Although the court below did not have to reach the point, the decision by the New Haven Court directing the decisions to be reached by the Interstate Commerce Commission improperly invaded the Commission's jurisdiction as well as that of the Philadelphia Court. See Ecker v. Western Pac. R.R., 318 U.S. 448, 474; Chicago, R.I. & P. Ry. v. Fleming, 157 F.2d 241, 244 (7th Cir. 1946), *cert. denied,* 329 U.S. 780; Collier on Bankruptcy, Vol. 5, par. 77.14, p. 539.

Nor is there merit in the argument that the New Haven Court retained jurisdiction over properties which it transferred by sale "free and clear of all liens, charges and encumbrances" and over which the Philadelphia Court now has exclusive jurisdiction. As the court below pointed out (Pet. in No. 71-14-01, App. p. A17), even had it done so, the reservation could not prevail, under Section 77(a) and the decision in *Warren* v. *Palmer, supra,* to permit an interference with the responsibilities of the Philadelphia Court. In fact, however, the New Haven Court reserved jurisdiction only to pass upon objections to the amount and the form of consideration *which had been previously filed with the court*—a recognition that the transfer of the assets did not preclude the continuance of the controversy as to the price to be paid by Penn Central which was finally settled by this Court in the *New Haven Inclusion Cases.*[10]

V

A final comment is appropriate on petitioners' contention that the decision below deprives the New Haven estate of essential protection. As already noted, the New Haven Trustee has submitted the New Haven

[10] On March 31-April 2, 1969, the New Haven Court held hearings called "hearing and argument on all remaining objections to the plan of reorganization and claims for equitable treatment." At the outset the court noted that, since ample notice had been given requiring the filing of such objections and claims, any further filings were barred (Tr., March 31, 1969, p. 16). The hearings centered around claims that the price to the Penn Central should be increased, but no equitable lien or constructive trust, or any similar security interest, was claimed. It was more than a year after the New Haven Court had ordered the transfer of the New Haven properties to Penn Central before any such claim was made.

claim, including the claim to an equitable lien and a constructive trust, to the jurisdiction of the Philadelphia Court. That court, to ensure against prejudice to the New Haven claim, has taken the unusual step of according the New Haven interim protection pending a final hearing by providing that the New Haven has a lien on all its former real property and readily identifiable personal property, indeterminate in amount and indeterminate as to priority, pending final decision on its claim. That final decision is unquestionably the responsibility of the Philadelphia Court under Section 77(c)(7). *Isaac* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734; *Ex parte Baldwin*, 291 U.S. 610; *Collier on Bankruptcy*, Vol. 2, par. 23.04. That court has evidenced its intention to exercise its jurisdiction in that respect, with due regard to the rights of all other Penn Central creditors. Moreover, the New Haven has a legal lien on all former New Haven real property given to secure the Divisional First Mortgage and bonds of Penn Central which it holds. Finally, with respect to the only property not covered by the legal lien of the mortgage or the interim lien declared by the Philadelphia Court—a share of the "excess income" from the Grand Central Terminal properties (see 399 U.S. at 438-451)—the decision by the Philadelphia Court refusing to recognize the New Haven claim to a constructive trust thereto is now before the Court of Appeals for the Third Circuit (p. 13, n.), and is appropriately to be resolved in that litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of PENN CENTRAL TRANSPORTATION COMPANY, Debtor	In Proceedings for the Reorganization of a Railroad No. 70-347

[In re: Claim of Richard Joyce Smith, Trustee of the N.Y., N.H. & H. Railroad]

Opinion

Order No. 546

FULLAM, J. December 31, 1971

The Trustees have petitioned for determination of the issues raised by the proof of claim filed by the reorganization Trustee of the New York, New Haven and Hartford Railroad Company (hereinafter "New Haven Trustee"), and certain related applications by the Trustees for interim relief. The claim in question is an outgrowth of the litigation which culminated in the decision of the Supreme Court in the *New Haven Inclusion Cases*, 399 U.S. 392 (1970). The New Haven Trustee asserts that these issues have already been decided by the United States District Court for the District of Connecticut, which has jurisdiction over the New Haven reorganization.

I. Background

On March 6, 1962, the Pennsylvania Railroad Company and the New York Central Railroad Company made application to the Interstate Commerce Commission under Section 5(b) of the Interstate Commerce Act (49 U.S.C. §5(b)(1), for approval of a proposed merger of the two railroads into what ultimately became the Penn Central Transportation Company, the Debtor herein.

On June 26, 1962, the New Haven, then in reorganization for the second time in less than 20 years, sought inclusion in the merger. Eventually, over the objections of the merger proponents, the Commission, by its order of April 6, 1966, made its approval of the merger conditional upon inclusion of the New Haven, on terms to be negotiated by the parties, subject to the approval of the I.C.C. and the New Haven reorganization court. 327 ICC 475, 553. It was recognized that any attempt to recapitalize the New Haven and include it as an operating company would be pointless in view of its hopelessly deteriorating financial condition. Accordingly, the outright sale of the New Haven's assets was the method of inclusion selected. This transaction was to constitute the first step of a two-step reorganization plan for the New Haven. *New Haven Inclusion Cases*, 399 U.S. 392, 410 at n. 45 (1970).

The New Haven Trustee and the merger proponents originally agreed that a fair purchase price for the New Haven assets would be $125,000,000. The Commission also approved this price,[1] which was to be paid by a "package" consisting of $8,000,000 in cash, $23,000,000 in (divisional) first mortgage bonds, the assumption of certain New Haven liabilities, closing adjustments, and the issuance of shares of common stock in the new corporation. The parties, and the Commission, valued the common stock at $87.50 per share; thus the stock constituted the major part of the consideration flowing to the New Haven estate. It is conceded that this feature of the transaction was eagerly sought by the New Haven estate.

While the transaction as thus formulated was designed to produce the equivalent of $125,000,000 for the New Haven estate, the Commission further found that it would cost Penn Central the equivalent of $157,000,000, largely because of the interim and continuing losses of the New Haven

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[1] 331 ICC 627, 692.

which the Penn Central would be required to assume. Thus, Penn Central would pay $157,000,000 in exchange for assets having only negative earning power. But, apparently convinced that the merger would "save" upwards of $80,000,000 per year, the Commission concluded that the inclusion of the New Haven on the above terms "would be both 'just and reasonable' as a condition of the merger under §5 . . . and 'fair and equitable' as part of a plan of reorganization under §77. . . ." *New Haven Inclusion Cases,* 399 U.S. 392, 413 (1970).

At this point, procedural complications developed. The I.C.C. order was subject to dual review: in the Connecticut District Court, and in a three-judge statutory court in the Southern District of New York. The former had jurisdiction over the reorganization of the New Haven, the latter over the merger (and the related inclusion) under §5 of the Interstate Commerce Act. Appeals were taken to both courts, by New Haven creditor groups asserting that the price was too low, and by various parties opposed to the merger, the New Haven inclusion, or both.

The Connecticut Court concluded that the New Haven assets were worth between $33,000,000 and $55,000,000 more than the agreed price, *In re New York, N.H. & H.R.R.,* 289 F.Supp. 451, 465 (D.C. Conn. 1968), while the merger court concluded that the deficiency was in the range of $45,000,000 to $50,000,000. *N.Y., N.H. & H.R.R., First Mtg. 4% Bondholders' Committee v. United States,* 289 F.Supp. 418, 440 (S.D.N.Y. 1968).

On remand, again in a combined proceeding involving both the merger and the reorganization, the I.C.C. increased the price by some $37,700,000, but allowed certain further deductions totaling $22,100,000, thus producing a net price increase of $15,600,000. The total price set by the Commission was approximately $145,600,000. The increase was to be paid by issuing $7.4 million more of divisional mortgage bonds, and by assuming certain additional liabilities.

By this time, the New Haven was in such desperate straits that cessation of rail services appeared imminent. Accordingly, the I.C.C. concluded that the assets should be immediately transferred to Penn Central, and Penn Central should be required to take over the New Haven's operations, without awaiting final judicial review of the price. This was accomplished, pursuant to the I.C.C. opinion and an order of the New Haven reorganization court, as of December 31, 1968, by an outright conveyance to Penn Central "free and clear of liens." The price set by the I.C.C. was paid, subject to adjustment on appeal.

On the second round of appeals, the merger court generally upheld the I.C.C., but made some adjustments which increased the price by about $990,000. *N.Y., N.H. & H.R.R., First Mtg. 4% Bondholders' Committee v. United States,* 305 F. Supp. 1049 (S.D.N.Y. 1969). This, too, was paid. However, the reorganization court increased the price by some $29,000,000. *In re N.Y., N.H. & H.R.R.,* 304 F.Supp. 793 and 304 F.Supp. 1136 (D. Conn. 1969).

When the merger was originally consummated in 1966, the median price of Penn Central stock was $87.50. By the time of the conveyance of the New Haven assets on December 31, 1968, the price had declined to an average of about $69.50 per share, *see: New Haven Inclusion Cases,* 399 U.S. at 485, but all concerned apparently felt that the long-range benefits of the merger would improve the market. Accordingly, in authorizing the New Haven Trustee to accept 950,000 shares of Penn Central stock as representing payment of $83,125,000 of the purchase price, the Connecticut court imposed on Penn Central an underwriting plan which in effect required Penn Central to guarantee that the stock would again reach $87.50 per share by February 1, 1978; otherwise, Penn Central would pay the New Haven Trustee the difference in cash. *See* 304 F.Supp. at 808-810.

Appeals from the orders of both courts were pending before the Supreme Court when the Penn Central went into

bankruptcy. Eight days later, on June 29, 1970, the Supreme Court decided the pending appeals. *New Haven Inclusion Cases,* 399 U.S. 392 (1970). The Court (a) affirmed the New Haven reorganization court's determination that the correct price for the New Haven assets was $174,000,000; (b) vacated that part of the reorganization court's judgment which set up the underwriting plan; and (c) directed the merger court to abstain "pending the further proceedings before the I.C.C. and the reviewing courts under Section 77 of the Bankruptcy Act."

As can be seen from the foregoing recital, there were two separate issues involved throughout these proceedings: the value of the New Haven assets, and the value of the consideration to be furnished by Penn Central. When the I.C.C. and the lower courts considered the case, the value of the assets was decreasing, even negative; whereas the value of the consideration was thought to be likely to increase. By discarding going-concern, or income-producing, approaches, and choosing a liquidation hypothesis, the reorganization court established a floor under the declining asset value. And its underwriting provision was designed to insure that the consideration value would correspond to the price thus fixed.

By the time the Supreme Court decided the case, it was apparent that the underwriting scheme was no longer feasible.

II. The Issues

Before attempting to discuss the precise extent of this Court's jurisdiction and the desirability *vel non* of its exercise, it may be helpful to review the issues which, in consequence of the Supreme Court's decision, remain open for further consideration. Unfortunately, even this subject is not free from doubt.

It is clear that the value of the New Haven assets which were conveyed to Penn Central as of December 31, 1968,

has been finally and unalterably fixed at $174,000,000. If the "package" of consideration previously furnished by Penn Central were to be valued as of the time of payment and treated as an accomplished fact, then the only remaining issue would be the form of payment of the $28,000,000 balance. But the Court has expressly stated that, in the light of intervening events, the underwriting scheme which was designed to produce a value of $87.50 per share of the common stock "may be wholly unrealistic." From this it can be argued, either that the Court intended that only the underwriting scheme should be reconsidered, or that the true value of the "package" as of December 31, 1968, should be reappraised in the light of subsequent events, or that the entire "package" should be reevaluated as of present day values. There is language in the Court's opinion which can be construed as lending support to each of these possible constructions.

The Court stated, 399 U.S. 392, at p. 489:

> "Accordingly, we set aside the order of the Connecticut District Court *insofar as it determines that an intrinsic value of $87.50 inheres in the Penn Central common stock and implements an underwriting plan to secure payment of that sum.* Further proceedings before the Commission and the appropriate federal courts will be necessary to determine the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a shareholder or creditor of Penn Central." [emphasis added]

However, immediately preceding this language, the Court stated (pp. 488-89):

> "The fairness and equity that are the essence of a Section 77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value. And the same considerations of fairness and equity prevent imposing on Penn Central the burden of immediate payment in full, particularly when it is re-

membered that the New Haven bondholders have never objected to the receipt of Penn Central stock in exchange for the New Haven assets."

Elsewhere (at pp. 489-90), in discussing the constitutional rights of the bondholders, the Court stated:

". . . The purchase price that the Commission and the reorganization court have required Penn Central to pay to the New Haven estate is based upon the liquidation value of the seller's assets, appraised as of December 31, 1966. That price hypothesizes a shutdown of New Haven followed by a sell-off of its assets at their highest and best value. In the circumstances of this case, and for the reasons we have already set out at length, we agree with the reorganization court that it would be unfair and inequitable to allow Penn Central to take the properties for any lesser sum. Moreover, *we today require a reassessment of the consideration* that Penn Central is to give in exchange for those properties. We thereby accord the bondholders the right to a liquidation and a per parcel sale that is theirs by virtue of their mortgage lien. . . ." [emphasis added]

And finally, there is at least surface inconsistency between the Court's language at page 488:

". . . But we cannot avoid the impact of recent events in assessing the propriety of the decree that [the reorganization] court has entered. . . ."

and the express disclaimer set forth in a prefatory footnote in which, after noting the commencement of Penn Central's reorganization proceeding, the Court stated:

"Whether the financial obligations dealt with in the present opinion may become subject to modification in or because of those proceedings is a question with which the present opinion in no way deals."

In view of the fact that the opinion was filed shortly after Penn Central's bankruptcy, and that the implications of the bankruptcy had not been briefed or argued, it may

well be that the "recent events" mentioned in the text referred to the pre-bankruptcy decline in Penn Central's fortunes, and not to the bankruptcy itself. Another possible way to reconcile these two comments might be to construe the Supreme Court's mandate as directing that the underwriting scheme, or the valuation of the entire package of consideration, must be reconsidered by reason of the intervening bankruptcy, but without any attempt on the part of the Court to suggest what effect, if any, the intervening bankruptcy should have on the result. Or, the Court may merely have wished to make clear that, whatever the outcome of its mandated reevaluation, various parties in interest in the Penn Central reorganization proceeding would still be able to challenge it in this reorganization proceeding.

To summarize, the issues which remained to be decided after the Court's action include at least (1) the method of payment of the $28,000,000 increase; (2) the underwriting scheme, or a substitute therefore; (3) whether the stock transaction can or should be rescinded, or recast; (4) whether the New Haven estate can or should be accorded the status of a secured creditor with respect to some or all of the further consideration to be furnished; and (5) the treatment to be accorded whatever claims emerge from decision of the foregoing issues, in the Penn Central bankruptcy proceeding.

III. Post-Bankruptcy Events

Since the opinion of the Supreme Court was handed down, the litigation has followed a potentially awkward course both in this court and in the Connecticut court, generating the specific controversies which this court is now asked to consider. In this court, the New Haven Trustee, in May of 1971, filed a proof of claim, as a secured creditor, in the sum of $132,000,000. This amount was arrived at by deducting from the $174,000,000 total purchase price approved by the Supreme Court the various

cash payments which have been made, the face value of the mortgage bonds which have been issued, and certain obligations assumed by Penn Central. Thus, the New Haven proof of claim asserts that the New Haven is a secured creditor for the full balance of the purchase price, plus interest thereon, without any adjustment for the 950,000 shares of Penn Central stock.

The Connecticut court filed an opinion and on June 11, 1971, entered an order,[2] which, in remanding the case to the Interstate Commerce Commission, imposed an "equitable lien" in favor of the New Haven, upon all of the former New Haven assets conveyed to Penn Central (except rolling stock) for the full balance of the purchase price (*i.e.*, $174,000,000, less cash payments on account, obligations assumed, and mortgage bonds issued); declared the existence of a "constructive trust" in one-half of the income from the Grand Central Terminal properties in New York, in the sum of $28,000,000; concluded that the 950,000 shares of Penn Central stock which were part of the original purchase price paid in 1968 should now be regarded as being held merely as security for the payment of the full balance; and directed the Interstate Commerce Commission to implement these provisions in carrying out its mandate. The Connecticut court also, acting on its own motion, designated a named attorney as the representative of the court to take immediate steps to record the "equitable lien" wherever necessary under state law, in the four states in which the former New Haven assets were thought to be located. An appeal from these orders is now pending before the Court of Appeals for the Second Circuit.

The Trustees of the Debtor sought interim relief in this Court from certain aspects of the Connecticut court's order. By Order No. 296, this request was granted in part, in an order directed only to the litigants, and those in privity

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[2] *See: In re N.Y., N.H. & H.R.R.*, 330 F.Supp. 131; 331 F.Supp. 212 (D. Conn., 1971).

with them, and designed only to preserve the *status quo* pending ultimate resolution of these issues, by prohibiting any attempts to exact payment. An appeal from this order is now pending before the Court of Appeals for the Third Circuit.

At the same time, the Trustees filed the present application, seeking an immediate determination by this court of the merits of the New Haven Trustee's proof of claim. At the hearing on this application, the New Haven Trustee relied solely upon the opinion and order of the Connecticut court in support of its proof of claim. (Tr. 2730.)

It would be naive to ignore the potential for unseemly conflict between courts of coordinate jurisdiction which inhere in these circumstances and events. On the other hand, however, care must be taken not to exaggerate or unduly emphasize such potential conflict. Where related controversies, or different aspects of the same controversy, are properly presented to two courts for decision, it is sometimes necessary for both courts to express their views. *Cf. Dellinger v. Mitchell*, 442 F.2d 782, 787-88 (D.C. Cir. 1971). The applications now pending in this court cannot be simply ignored, and they cannot be disposed of without considering the jurisdictional and other issues presented. The unique and complex relationship between the two reorganization proceedings, in my judgment, makes it necessary for both courts to decide their respective portions of the issues presented, in the interests of expediting final and conclusive resolution of all of the issues involved in the entire litigation. Every reasonable effort should be made, of course, to minimize differences.

IV. Jurisdiction

As noted above, the Supreme Court held that "further proceedings before the Commission and the appropriate federal courts will be necessary to determine the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a share-

holder or creditor of Penn Central." From the use of the plural ("courts"), and the fact that the Supreme Court directed the merger court to abstain, it can be argued that the opinion contemplated that this court would be involved in the ultimate determination of some or all of the issues remaining open. Nevertheless, it must be recognized that the litigation in which the opinion was rendered did not originate in this court, and that the Supreme Court's mandate was directed to the Connecticut court. In view of the language quoted above, and the disclaimer in the prefatory footnote at the beginning of the Supreme Court's opinion, this much at least is certain: the Supreme Court has not suggested that this court should refrain from carrying out its functions under the reorganization statute.

In the ordinary course of reorganization, this court, pursuant to Section 77(c)(7) of the Bankruptcy Act, is required to determine the amount of an unliquidated debt, decide whether the claim is secured or unsecured, and classify the various claimants "according to the nature of their respective claims and interests" for purposes of the reorganization plan. 5 *Collier on Bankruptcy*, §§77.20, 77.21; 6A *Collier on Bankruptcy*, §9.02. In carrying out these functions, this court would be bound by principles of *res judicata* and full faith and credit. To the extent that the judgment of the Connecticut court became final, either before bankruptcy or by virtue of the Supreme Court's affirmance shortly after bankruptcy, no question arises. But to the extent that additional obligations are sought to be imposed, or additional liens created, after Penn Central's bankruptcy, without the consent or approval of this Court, very serious jurisdictional questions appear. The Trustees have never been made parties to the proceedings in the Connecticut District Court, nor has anyone sought leave of this court to proceed against them in that regard.

Perhaps this is but another way of pointing out that, since the New Haven assets were conveyed to Penn Central free and clear of all liens, including all claims of the New

Haven estate, on December 31, 1968, and since they remained in the ownership and possession of Penn Central on the date of bankruptcy, the filing of Penn Central's reorganization petition vested exclusive jurisdiction over these assets in this court, and made it jurisdictionally impossible for any other court to impose liens upon them, except with the approval of this court.

Counsel for the New Haven Trustee suggested at oral argument that one solution to this impasse would be for this court now to authorize and direct the Trustees to subject themselves to the jurisdiction of the New Haven court, and thereafter for this court to abstain until final appellate determination in the Second Circuit proceedings. While the thought of allowing the cup thus to pass has considerable appeal, this approach contains its own grave difficulties. In the first place, by the time this suggestion was made, the proceedings in the Connecticut District Court had, to all practical intents and purposes, already terminated.[3] Whether something could have been, or could now be, done to overcome this difficulty need not now be considered. For the due process rights of the Penn Central creditors present a more serious problem.

It is no answer to state that the Trustees act as representatives of the creditors of Penn Central. In a sense this is true, inasmuch as the Trustees do have the obligation to preserve the Debtor's estate for the benefit of all concerned. But the Trustees cannot adequately represent one or more groups of creditors in disputes involving relative priorities of claims.

To the extent that the New Haven Trustee seeks a post-bankruptcy adjudication which would transform its $83.1 million stock transaction into a secured claim, create a further secured claim in the sum of $28,000,000, plus inter-

[3] The Trustees did appear in some limited fashion in the Connecticut proceeding. The extent of this participation and the procedural adequacy of the proceedings are among the issues now pending on appeal in the Second Circuit.

est on the aggregate sum, and establish some further type of security ("constructive trust") in certain current income of the Debtor, I am convinced that the various creditor interests of Penn Central have an absolute constitutional right to be heard before final decision.[4] I am also satisfied that the only forum in which these interests now can (or, conveniently, ever could) be heard is in the context of the Penn Central reorganization.

Any railroad reorganization proceeding is a complex form of litigation, and has many aspects. The New Haven reorganization is no exception. For present purposes, the Connecticut proceedings can be seen as involving the formulation and implementation of a plan of reorganization of the New Haven, a mandate from the Supreme Court, and litigation which was pending on the date of Penn Central's bankruptcy, in which claims are being asserted against Penn Central. This court has no direct concern with the first two of these three aspects, and should clearly refrain from taking any action which might infringe upon the jurisdiction of the Connecticut court. However, insofar as new or additional claims are being asserted therein against the Debtor's estate, I am required to decide whether the assertion of these claims in that forum should be permitted to continue, in view of the Penn Central bankruptcy and the stay of suits provisions of Order No. 1 herein.

As between the New Haven Trustee and the Debtor, these claims, notwithstanding their unusual ramifications, are

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[4] New or additional credit aggregating hundreds of millions of dollars was extended to Penn Central between December 31, 1968, and the date of bankruptcy. Additional obligations, both secured and unsecured, were incurred. These creditors may be able to establish that they relied in part upon the "free and clear" (former) New Haven assets, and that actual or constructive notice that the full purchase price was not finally settled would not constitute notice of a potential retroactive lien, especially with regard to payments already made. At least, their opportunity to attempt such proof cannot be foreclosed.

essentially pre-bankruptcy claims, contractual in nature. They were submitted to the jurisdiction of this court when the New Haven Trustee filed his proof of claim in these proceedings, an event which occurred before the Connecticut court's adjudication.

The leading case involving the jurisdictional interplay between two railroad reorganization courts is *Warren v. Palmer,* 310 U.S. 132 (1940). The Court held that the reorganization court which had jurisdiction over the debtor in possession of leased lines could impose liens on the leased property for operating expenses, notwithstanding the fact that the lessor was also in reorganization in another court. Since the case involved largely post-bankruptcy issues, and liens which were necessary for the continued operation of rail service, the decision is not directly apposite. However, to the extent that it does bear on the present situation, it lends support to the position of the Penn Central Trustees in this case.

Whether the present issue be regarded as a question of the exercise of this Court's discretion as to whether or not to stay pending litigation in another jurisdiction, or, independently of the "stay of suits" question, the determination as to which of two reorganization courts is the preferable forum, I am constrained to reach the somewhat uncomfortable conclusion that the ultimate decision depends to a large extent upon the result which has been or may be reached in the other jurisdiction. The usual standards to be applied in this situation—impact on the formulation of a reorganization plan and the continuance of rail service, *cf. Warren v. Palmer, supra; Gardner v. New Jersey,* 329 U.S. 565 (1947), and impact on this court's interim administration of the reorganization proceeding, *see Congress of Railway Unions, et al. Appeal,* —— F.2d —— (3d Cir., July 16, 1971) —must be assessed in light of the actual or threatened outcome of the pending litigation.

If the Connecticut court had simply remanded the matter to the Interstate Commerce Commission, the "form" of

Penn Central's consideration and the "status" of the New Haven would presumably be determined by the Commission simultaneously in both the New Haven reorganization proceeding (including the remnants of the merger case) and in the Penn Central reorganization proceeding. It is reasonable to assume that these initial determinations would have been internally consistent. Review would then be available, in the Connecticut court in the New Haven proceeding, and in this court in the Penn Central proceeding. If the two courts then viewed the issues differently, there might be separate appeals in the two proceedings, the parties might agree upon a single appeal, or one court might defer to the other. Since the decision of each court would have had its genesis in a proceeding in which all concerned were heard, some form of unification of the appeal process would probably be feasible. Moreover, there is every reason to suppose that the Commission, which is, after all, primarily responsible for the formulation of reorganization plans, *see Group of Institutional Investors v. Chicago, Minneapolis, St. Paul and P.R. Company,* 318 U.S. 523, 544 (1943); *Reconstruction Finance Corporation v. Denver and Rio Grande and Western Railroad Company,* 328 U.S. 495, 530 (1946), might be expected to resolve these issues in a manner which would withstand attack in both courts. As matters now stand, however (depending in part upon the outcome of the pending appeal in the Second Circuit), it is difficult to see how the Commission, confronted with the order of the Connecticut court, could properly perform its function in either proceeding.

I hasten to emphasize that the Connecticut court has made it clear that it does not view its order as in any way controlling the ultimate disposition of the New Haven Trustee's claim in the reorganization plan of the Penn Central. However, this assurance can be, and is widely interpreted by Penn Central creditor groups as being, limited to the notion that the New Haven Trustee's ultimate participation in a reorganized Penn Central would be deter-

mined in the Penn Central reorganization proceeding. The recalculated amount of the New Haven Trustee's claims, and their character as secured or unsecured, are a different matter; yet these are the critical determinations insofar as Penn Central's other creditors are concerned.

While the existence of a declared lien would ordinarily have little adverse effect upon the interim conduct of the reorganization process, if it were subject to reconsideration in the ultimate reorganization plan, the fact remains that in this case, unless the declared lien is to be simply disregarded, difficult and burdensome accounting procedures might be required. To the extent that the lien purportedly attaches to all of the former New Haven assets (except rolling stock), whether real or personal, thus apparently even including office furniture and supplies, the interference with the orderly process of the reorganization and the operations of the Debtor in the interim is potentially quite substantial. Further, obvious difficulties arise with respect to that part of the Connecticut court's order which imposes a "constructive trust" upon substantial amounts of income now available to the Trustees for operating expenses.

For all of these reasons—the seeming incompleteness of the Connecticut court's jurisdiction, the exclusive jurisdiction of this court over the assets in the possession of the Debtor, and the probable impact upon the reorganization proceedings and the ultimate reorganization plan for Penn Central—if the issues were being presented to this court for completely independent decision, I should be inclined to stay the prosecution of these claims by the New Haven Trustee in other forums. But the Connecticut court's determination of its own jurisdiction is entitled to great weight. Considerations of comity, and due deference to the views of an eminent jurist of exceptional experience in these matters, alike dictate that every effort be made here to avoid reaching a result which might further complicate matters, or seem to interfere unduly in the other related proceeding.

When the case was before the Supreme Court, the basic issues were whether the inclusion terms were "just and reasonable" under §5 and "fair and equitable" under §77. The Court held that, inasmuch as Penn Central had agreed to the inclusion, the issue was essentially the same under both statutes, and involved the valuation of the New Haven assets, a task peculiarly within the jurisdiction of the New Haven reorganization. I shall assume that the §5 criterion is no longer open for consideration. But in the present posture of the case, determining what is "fair and equitable" from the standpoint of the New Haven reorganization, or even from the joint standpoint of the New Haven reorganization and a solvent Penn Central in private management, is not necessarily the same as determining what is "fair and equitable" in the total context of both reorganizations.

In short, the result of the ultimate decision of the substantive issues raised here must appear to the Connecticut court to be consistent with a "fair and equitable" plan for the New Haven, and must also appear to this court to be consistent with a "fair and equitable" plan for the Penn Central. Neither court can delegate this decision to the other, nor would abstention be permissible.

Accordingly, it seems appropriate to view the Connecticut court's order of June 11, 1971, as essentially constituting a declaration of what would be consistent with a fair and equitable plan for the New Haven reorganization. But it does not, and in my view cannot, constitute a binding determination of what would be consistent with a "fair and equitable" reorganization of Penn Central.

Determining the components which will go to make up the present liquidated amount of the New Haven claims is one thing; deciding whether the various components are all entitled to the same priority is quite another.

In my judgment, the only conclusion which need now be expressed is that, whatever may be the situation as between the New Haven Trustee and the stockholders of the Debtor,

I do not consider that any issues of relative priority, or of amount (except for the additional $28,000,000), have been determined with finality insofar as other creditors of Penn Central are concerned.

V. The Merits

As stated at the outset, the Trustees are pressing for an immediate ruling on the proof of claim filed in these proceedings by the New Haven Trustee. They have presented extensive argument to the effect that the lien is without legal or equitable basis, is contrary to the law of all of the states in which the property is located, and is otherwise invalid. No doubt the decision of the Second Circuit in the pending appeal will be instructive, or even dispositive, as to many of these issues.

As I view the matter, however, the merits of this claim cannot properly be determined on the present record, in any event. The present posture of the proof of claims program is such that, although the deadline for filing proofs of claim has passed, and the claims which have been filed are being classified and processed, complete lists of the claims have not yet been made a matter of record; and the deadline for filing objections to claims has not yet been fixed. While various creditor interests did get notice of the hearing on the present petition, and some creditor groups have expressed their views on the merits of the New Haven claim, many parties potentially affected thereby have had neither notice nor opportunity to express their views. I refer specifically to the unsecured creditors, who seemingly would be most directly affected by the outcome.

Moreover, as a practical matter, if a plan for Penn Central can be devised which makes adequate provision for all creditors, whether secured or not, the New Haven Trustee's claims will diminish in poignancy. And the underlying constitutional issues can be more clearly perceived and dealt with after the various valuation studies now in progress are completed.

It is a reasonable supposition that the principal objectives of the current efforts by the New Haven Trustee are (a) to insure that he will have standing to object to the sale or other disposition of any substantial portion of the former New Haven assets, or the proceeds of such sales; (b) to provide protection in the event the Penn Central reorganization proceeding is dismissed; and (c) to insure preferred status in the event Penn Central's reorganization plan does not contain adequate provisions for unsecured claims. As set forth earlier, I am satisfied that none of these matters can be finally determined except in these proceedings, after all parties in interest have had an opportunity to be heard. However, I see no reason why reasonably adequate interim protection should not be afforded the claims of the New Haven Trustee.

Accordingly, I have concluded that, pending final determination of all of the issues involved in the appropriate forum or forums, and unless and until otherwise ordered by this court or by an appellate court of competent jurisdiction, the New Haven Trustee shall be deemed to have a tentative lien, indeterminate in amount, upon all real property all readily identifiable personal property (except rolling stock) formerly owned by the New Haven estate and conveyed to the Penn Central as of December 31, 1968, which were still in possession of the Debtor's estate on June 11, 1971. The provisions of Orders Nos. 78 and 192 shall be applicable. This, of course, does not constitute the expression of any view as to the merits of the claim or the asserted lien. The restraints imposed by Order No. 296 will remain in effect.

In order to promote the orderly and expeditious resolution of all of the issues surrounding the New Haven's claims, this court will, on application, at such time as the remand of the inclusion litigation to the I.C.C. becomes effective, certify to the Commission, for its recommendations and report, any appropriate question relating to the

valuation and proper treatment of the claims of the New Haven Trustee, including, by way of illustration: (1) The value of the various items of consideration transferred by Penn Central, on the respective dates of transfer, if no value is attributed to Penn Central's obligations under the underwriting agreement; (2) The value of Penn Central's obligations under the underwriting agreement, reappraised in the light of subsequent events; (3) The separate components of a presently fair and equitable consideration package, and the values of each.

In all other respects, disposition of the issues committed to this court must await the normal processing of the New Haven Trustee's proof of claim.

Order No. 546

AND NOW, this 31st day of December, 1971, it is ORDERED:

1. That, without prejudice to the ultimate resolution of the merits of the claims asserted, the Trustee of the New York, New Haven & Harford Railroad shall, unless and until otherwise ordered by this Court or an appellate court of competent jurisdiction, be deemed to have a lien, indeterminate in amount, and indeterminate as to priority, upon all of the real property and readily identifiable tangible personal property (exclusive of rolling stock) conveyed to Penn Central by the said New Haven Trustee as of December 31, 1968, and remaining in possession of the Trustees of the Debtor as of June 11, 1971.

2. That the provisions of Orders Nos. 78 and 192 shall be fully applicable to transactions respecting said assets.

3. That the restraints imposed by Order No. 296 shall remain in effect until further order of this Court.

4. That this court will entertain applications for reference of appropriate issues to the Interstate Commerce Commission in accordance with the views expressed in the foregoing Opinion.

5. That the ultimate disposition of the claims asserted by the New Haven Trustee is deferred pending completion of the program for handling proofs of claim in these proceedings, and the receipt and consideration of objections in accordance with such program.

/s/ JOHN P. FULLAM
J.